September 7, 2001

(6)

Supreme Court, U.S.
FILED
SEP 7 2001
CLERK

No. 00-952

IN THE

SUPREME COURT OF THE UNITED STATES

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

ON WRIT OF CERTIORARI TO THE
WISCONSIN COURT OF APPEALS, DISTRICT IV

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITIONER

CHARLES A. MILLER
Counsel of Record
ANN-KELLEY KEMPER
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Washington, D.C. 20044
(202) 662-6000

Attorneys for *Amici Curiae*
State Medicaid Agencies*

* *Individual amici curiae listed on inside cover.*

36 pp

Of Counsel:

Bill Pryor
Alabama Attorney General;

Carla J. Stovall
Kansas Attorney General

John J. Farmer
New Jersey Attorney General

Wayne K. Stenehjem
North Dakota Attorney General

Betty D. Montgomery
Ohio Attorney General

Paul G. Summers
Tennessee Attorney General

Mark L. Shurtleff
Utah Attorney General

Christine O. Gregoire
Washington Attorney General

***Amici Curiae* Medicaid Agencies:**

Alabama Medicaid Agency, Alaska Department of Health and Human Services, Idaho Department of Health And Welfare, Kansas Department of Social and Rehabilitation Services, Kentucky Cabinet for Medicaid Services, Louisiana Department of Health and Hospitals, New Jersey Department of Human Services, North Dakota Department of Human Services, Ohio Department of Human Services, The Oklahoma Health Care Authority, Rhode Island Department of Human Services, Tennessee Department of Human Services, Utah Department of Health, Washington Department of Social and Health Services

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 2

SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. OVERVIEW OF THE SPOUSAL IMPOVERISHMENT PROVISIONS 8

A. Relevant Medicaid Eligibility Standards 8

B. The Pauperization of the Community Spouse Under the Old Law 9

C. The Medicaid Catastrophic Coverage Act of 1988 10

D. The Mechanics of § 1396r-5 11

1. Income Standards and Transfers 11
2. Resource Standards and Transfers 13
3. Adjustments to the Standard Resource Allowance 14

E. The Development of the Income-First and Resource-First Rules 15

F. The Drafting History of Subsection (e)(2)(C) 16

G. Agency Interpretation of Subsection (e)(2)(C) 20

II. THE STATUTE DOES NOT MANDATE A RESOURCE-FIRST APPROACH 20

A. The Statute Is Ambiguous on This Question 20

B. The Statute Does Not Specify What Sources of Income May Be Considered in the (e)(2)(C) Analysis. 21

C. The Fact That Income Transfers Occur Post-Eligibility in No Way Precludes the Hearing Officer from Considering Such Future Transfers in the (e)(2)(C) Analysis. 22

D. The Mandatory Resource-First Rule Renders the Standard Income Allowance Meaningless 24

E. The "Name-on-the-Check" Rules Regarding the Availability of Income in Subsection (b)(2) Do Not Preclude Consideration of Income Transfers As Part of the (e)(2)(C) Analysis. 25

F. The Permissibility of Either Approach Is Consistent With the Placement of (e)(2)(C) in the Fair Hearing Section of the Statute. 26

G. The Income-First Rule Furthers the Twin Purposes Underlying the Statute. 27

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Page

Atkins v. Rivera, 477 U.S. 154 (1986).....2, 9

Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264 (1996).....19

Chambers v. Ohio Department of Human Services, 145 F.3d 793 (6th Cir.), *cert. denied*, 525 U.S. 964 (1998) 4, 7, 20, 28

Cleary v. Waldman, 167 F.3d 801 (3d Cir.), *cert. denied*, 528 U.S. 870 (1999).....4, 7, 20, 26, 27

Ford v. Iowa Department of Human Services, 500 N.W.2d 26 (Iowa 1993).....10

Golf v. New York Department of Social Services, 697 N.E.2d 555 (N.Y. 1998) 4, 7, 20, 28

Kmart Corp. v. Cartier, Inc., 486 U.S. 281 (1988) 23

Schweiker v. Gray Panthers, 453 U.S. 34 (1981) 21

Schachner v. Perales, 648 N.E.2d 1321 (N.Y. 1995) 10

Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735 (1996) 21

Thomas v. Commissioner of the Division of Medical Assistance, 682 N.E.2d 874 (Mass. 1997).....4, 7

Constitutional and Statutory Provisions

Family Support Act of 1988, Pub.L. No. 100-485, § 608(d)(16)(A)(i), 102 Stat. 2343, 2417 18

Medicare Catastrophic Coverage Act of 1988 ("MCCA"), Pub. L. No. 100-360, 102 Stat. 683 10

42 U.S.C. § 1396a 8, 9

42 U.S.C. § 1396r-5 (2001) ..... passim

Miscellaneous

133 Cong. Rec. 20,692 (1987) 11

133 Cong. Rec. 29,350-58 (1987) 17

133 Cong. Rec. 29353 (1987) 10

133 Cong. Rec. 29,429-30 (1987) 17

H.R. Conf. Rep. No. 100-661, 100th Cong., 2nd Sess. 264-67 (1988), *reprinted in* 1988 U.S.C.C.A.N. 923 17

H.R. Rep. No. 105(II), 100th Cong., 2nd Sess. 4, *reprinted in* 1988 U.S.C.C.A.N. 857 ..... 10, 16

IN THE SUPREME COURT OF THE UNITED STATES

No. 00-9952

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

On Writ of Certiorari to the
Wisconsin Court of Appeals, District IV

BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

The Medicaid agencies of fourteen states respectfully submit this brief *amici curiae* in support of the petitioner in

this case. Petitioner and respondent have consented to the filing of this brief.[1]

INTERESTS OF *AMICI CURIAE*

The amici curiae are the Medicaid agencies of the states of Alabama, Alaska, Idaho, Kansas, Kentucky, Louisiana, New Jersey, North Dakota, Ohio, Oklahoma, Rhode Island, Tennessee, Utah, and Washington (the "amici states"). This brief is submitted on their behalf.

Each of the amici states participates in the Medicaid program. As such, each state must comply with the Medicaid Act, 42 U.S.C. 1396 *et seq.* (1994 & Supp. 2000), and the federal regulations promulgated thereunder. *See Atkins v. Rivera*, 477 U.S. 154, 156 (1986). Within those parameters, however, the states have broad discretion to adopt standards for determining the extent of medical assistance provided, as long as such standards are reasonable and consistent with the objectives of the Act.

This case arises out of the "spousal impoverishment" provisions of the Medicaid Act, 42 U.S.C. § 1396r-5 (2001). Those provisions govern the allocation and distribution of a married couple's resources and income when one spouse (the "institutionalized spouse") is in a nursing home and seeks Medicaid benefits and the other spouse (the "community

---

[1] Under Rule 37, States are not required to obtain consent. Consent has been obtained here, however, in light of the fact that the brief is being submitted on behalf of agencies of the States. Correspondence reflecting the parties' consent has been lodged with the Clerk. Pursuant to Rule 37.6, the *amici* state that no counsel for the petitioner or the respondent authored this brief in whole or in part. Nor did any person or entity, other than the *amici*, make a monetary contribution to the preparation or submission of this brief.

spouse") still resides in the community. These rules were enacted in response to former rules that had the effect of leaving the community spouse with little or nothing on which to live once the institutionalized spouse became eligible for Medicaid. To that end, the provisions establish certain standard rules and thresholds that the states must follow both in determining the Medicaid eligibility of the institutionalized spouse in the first instance and in determining how much income the institutionalized spouse must contribute towards the costs of his care once eligibility is established.

The provisions also provide for fair hearings in certain situations in which the standard allowances set by Congress are insufficient to protect the community spouse. It is the fair hearing portion of the statute -- in particular, subsection (e)(2)(C) -- that is at issue here. Subsection (e)(2)(C) mandates an increase in the standard level of resources protected for the community spouse if the "community spouse's income" does not meet a certain minimum monthly need amount established by Congress. 42 U.S.C. § 1396r-5(e)(2)(C) (2001). The issue presented in this case is what the states may consider as "the community spouse's income" in making this determination.

The amici states have a substantial interest in this issue because many of them, like the petitioner, follow an "income-first" approach in determining whether to allow the community spouse to retain more resources than the standard amount provided in the statute. Other of the amici states, while not presently utilizing an income-first approach, wish to retain the option of applying that approach in the future.

Under the income-first approach, the state considers as part of the "community spouse's income" income that the statute expressly permits the institutionalized spouse to transfer to the community spouse to help meet her minimum monthly need. Only if this transferable income, together

with income in the community spouse's own name, is not adequate to meet the monthly need do these states permit the community spouse to protect a higher level of resources than the standard amount provided in the statute.

In contrast, a minority of states apply a "resource-first" approach. Under the resource-first approach, the state does not consider any income expressly transferable from the institutionalized spouse as part of "the community spouse's income" in determining whether to increase the standard resource allowance under subsection (e)(2)(C). Rather, the hearing officer must increase the amount of resources protected for the community spouse to a level sufficient to generate any shortfall between the minimum monthly need amount and income in the community spouse's own name.

The income-first approach has been upheld as a permissible interpretation of subsection (e)(2)(C) by every United States Court of Appeals and state court of highest resort to consider the issue. *See Cleary v. Waldman*, 167 F.3d 801, 811 (3d Cir.), *cert. denied*, 528 U.S. 870 (1999); *Chambers v. Ohio Dep't of Human Servs.*, 145 F.3d 793, 797-98 (6th Cir.), *cert. denied*, 525 U.S. 964 (1998); *Thomas v. Comm'r of the Div. of Med. Assistance*, 682 N.E.2d 874, 879 (Mass. 1997); *Golf v. New York Dep't of Soc. Servs.*, 697 N.E.2d 555, 558 (N.Y. 1998). In the case presently on review, however, the Wisconsin Court of Appeals held that the statute does not permit the income-first approach but rather mandates a resource-first approach.

The practical effect of a mandatory resource-first rule would be to allow couples in every state to shelter a substantially larger share of their resources from being spent down to qualify the institutionalized spouse for Medicaid. In cases involving community spouses with very little income in their own name, the amount that would need to be protected to generate sufficient income can add up to hundreds of thousands of dollars that normally would have

been spent on the institutionalized spouse's care before he or she qualified for Medicaid.

The import of this question for the amici states cannot be overstated. A mandatory resource-first rule, if sustained, would require a significant portion of the states' Medicaid budgets to be redirected to provide nursing home care for the middle class and would detract from the program's primary mission of providing medical care for the needy. Although the cost of a mandatory resource-first rule on a going-forward basis is difficult to quantify, the petitioner Wisconsin Department of Health and Family Services estimates the on-going costs of complying with such a rule to be $10 million per year in Wisconsin alone. *See* Pet. and App. for Writ of Cert. at 20 (filed Dec. 2000).

SUMMARY OF ARGUMENT

This case involves the spousal impoverishment provisions of the Medicaid Act. These provisions were enacted to remedy a flaw in the prior law as applied to married spouses that had the effect of impoverishing the spouse in the community when the other spouse entered a nursing home and sought Medicaid assistance. Under the prior rules, nearly all of a couple's joint resources would have to be spent down to qualify the institutionalized spouse for Medicaid. Once the institutionalized spouse qualified, the prior rules then required that nearly all of a couple's income be used to offset the costs of his or her care. This left the community spouse with little or nothing on which to live after the institutionalized spouse became Medicaid eligible.

The spousal impoverishment provisions attempted to address this problem by establishing various rules and thresholds for the allocation and distribution of income and resources between married spouses both pre- and post-eligibility. As to income, the provisions establish standard rules for the division of income between the spouses that

renders income in the community spouse's own name unavailable to the institutionalized spouse to offset the costs of his care. They then establish a "monthly need" threshold for the community spouse and allow the institutionalized spouse to transfer some of his or her income to the community spouse, if needed, to meet this monthly need. As to resources, they establish standard rules for the calculation and allocation of a couple's joint resources at the very beginning of the institutionalization in order to ensure that a certain amount of resources will not be spent down in qualifying the institutionalized spouse for Medicaid. They then provide that this amount, deemed the "resource allowance," may be transferred to the community spouse once the institutionalized spouse qualifies for Medicaid.

The provisions also provide for a hearing process that allows a couple to challenge the calculation of the various components that make up what the community spouse is allowed to keep. The spouses also may request a fair hearing to make adjustments where the standard allocations are insufficient to protect the community spouse adequately. One such provision permits a hearing officer to set a higher resource allowance where the income generated off the standard resource allowance is inadequate to raise the community spouse's income to the monthly need level. It is this provision, 42 U.S.C. § 1396r-5(e)(2)(C) (2001), that is in dispute.

Specifically, subsection (e)(2)(C) provides that "if either spouse establishes" that the standard resource allowance, in relation to the amount of income it generates, "is inadequate to raise *the community spouse's income*" to the minimum monthly need amount "there shall be substituted" for the standard resource allowance "an amount adequate to provide" the monthly need amount. 42 U.S.C. § 1396r-5(e)(2)(C) (2001) (emphasis added).

The question presented in this case is whether, in determining whether to substitute a higher resource allowance under subsection (e)(2)(C), the states may apply an "income-first" approach, or whether they must apply a "resource-first" approach. The income-first approach allows the state to consider as part of the "community spouse's income" transfers of income from the institutionalized spouse that the statute specifically permits to be made for the very purpose of meeting the community spouse's monthly need amount. Only if *all* sources of income contemplated under the statute are insufficient to meet the monthly need is a higher resource allowance substituted for the standard resource allowance. The resource-first approach, by contrast, precludes consideration of these income transfers as part of the "community spouse's income" in determining whether a higher resource allowance is warranted.

Opponents of the income-first approach argue that the plain meaning of "community spouse's income" in subsection (e)(2)(C) refers only to income in the community spouse's own name and does not contemplate potential transfers of income from the institutionalized spouse. This overly narrow interpretation of the statute -- the effect of which is to allow couples to shelter substantially more resources -- is inconsistent with the mechanics of the spousal impoverishment provisions themselves, the drafting history of subsection (e)(2)(C), and interpretive guidance from the federal agencies, all of which refute any suggestion that the statute mandates a resource-first approach.

It is also contrary to the reasoned analysis of every federal court of appeals and state court of last resort to have considered the issue, all of which have held that the statute is ambiguous in this regard and that either approach is permissible. *See Cleary*, 167 F.3d at 811; *Chambers*, 145 F.3d at 797-98; *Thomas*, 682 N.E.2d at 879; *Golf*, 697 N.E.2d at 558. As these courts have recognized, the mandatory resource-first rule reflects a fundamental

misunderstanding of the statute that fails to take into account the statute's overall structure, all of the provisions that address protection of income for the community spouse, and the role of subsection (e)(2)(C) in the statutory scheme.

ARGUMENT

I. OVERVIEW OF THE SPOUSAL IMPOVERISHMENT PROVISIONS

This case concerns the permissibility of the "income-first" rule followed by the amici states in applying 42 U.S.C. § 1396r-5(e)(2)(C) (2001). This question boils down to the meaning of three words in a subparagraph of a paragraph of a subsection in a complex statutory scheme. Given the complexity of the Medicaid Act generally and the spousal impoverishment provisions in particular, the meaning of these words cannot be understood without reference to the background and purpose of the spousal impoverishment provisions, the manner in which those provisions attempt to achieve this purpose, and the role that subsection (e)(2)(C) plays in the statutory scheme as a whole. The amici states therefore believe that they can best assist the Court by providing a comprehensive overview of the history, structure, and mechanics of the spousal impoverishment provisions.

A. Relevant Medicaid Eligibility Standards

Speaking very generally, Medicaid eligibility depends on two factors: level of income and level of resources. Each participating state develops a plan containing "reasonable standards . . . for determining eligibility for and the extent of medical assistance." 42 U.S.C. § 1396a(a)(17) (2001). These standards must "provide for taking into account only such income and resources as are, as determined in accordance with the standards prescribed by the Secretary, available to the applicant or recipient." *Id.* Thus, in order to be eligible for Medicaid, an individual must not have

"available" income in excess of certain prescribed limits. In making this calculation for applicants with income above such limits, a state may reduce countable income by the amount of incurred medical expenses (sometimes referred to as the "spend-down" option). *See Atkins v. Rivera*, 477 U.S. 154, 154 (1986). An applicant's resources also may not exceed certain prescribed limits. Applicants with resources in excess of those limits must deplete their resources to that limit before becoming eligible (also referred to herein as "spending down"). 42 U.S.C. § 1396a(a)(10)(17). Even after an individual becomes eligible for Medicaid, the program does not pay the full cost of care. Rather, the Medicaid rules require that the eligible individual use his own income to offset some of the costs of his or her care. The Medicaid program then covers the remainder.

Over time, certain "pre-eligibility" rules and principles have been developed to address the attribution of income received by couples when one spouse is pursuing Medicaid eligibility and with transfers of resources between spouses or other related parties where such transfers implicate Medicaid eligibility. Once a person qualifies for Medicaid, there are further "post-eligibility" rules that concern the amount of Medicaid benefits payable for that person's care. These rules relate to the amount of the couple's income that must be applied to the cost of nursing home care (and other health care) before Medicaid benefits become available to pay the remainder.

B. The Pauperization of the Community Spouse Under the Old Law

Prior to 1988, the rules concerning income and resources, when applied to a married person whose spouse remained in the community, had the effect of leaving the community spouse with little or nothing on which to live once the institutionalized spouse became eligible for Medicaid. In particular, the pre-eligibility rules that were in

place required the spouse seeking benefits to liquidate virtually all of the couple's joint resources in order to reach Medicaid eligibility levels. *See* H.R. Rep., No. 105(II), 100th Cong., 2nd Sess. 4, *reprinted in* 1988 U.S.C.C.A.N. 857, 889-90; *Ford v. Iowa Dep't of Human Servs.* 500 N.W.2d 26, 27 (Iowa 1993). This depletion in resources was compounded by the fact that, once the institutionalized spouse became eligible for Medicaid, the post-eligibility rules required that most of the couple's income be used to offset the cost of the institutionalized spouse's nursing home care before Medicaid payments would become available. *See Schachner v. Perales*, 648 N.E.2d 1321, 1322 (N.Y. 1995).

C. The Medicaid Catastrophic Coverage Act of 1988

In 1988, Congress attempted to address this problem by enacting the spousal impoverishment provisions of the Medicare Catastrophic Coverage Act of 1988 ("MCCA"), Pub. L. No. 100-360, 102 Stat. 683. The purpose of these provisions was to "to end th[e] pauperization [of the community spouse] by assuring that [she] has a sufficient -- but not excessive -- amount of income and resources available" when the other spouse is institutionalized in a nursing home. H.R. Rep. No. 105 (II), *reprinted in* 1988 U.S.C.C.A.N. at 888; *see also* 133 Cong. Rec. 29,353 (1987) (statement by Sen. Mikulski).

As the above statement reflects, the amendments were directed at two perceived flaws in the prior Medicaid rules when applied to elderly couples when one spouse requires nursing home care. The primary concern was the impoverishment of the community spouse discussed above. A secondary concern, however, was a loophole in the old law that allowed certain couples whose financial positions would normally not qualify them for medical assistance to shelter a majority of their resources in the community spouses' names based on the legal title principle, while the institutionalized

spouse received medical care paid by public funds. *See, e.g.*, 133 Cong. Rec. 20,692 (1987) (statement of Rep. Tauke) (amendments "will change the unfair policy which requires noninstitutionalized spouses to be impoverished . . . and at the same time . . . ensure that no one escapes contributing a fair share to nursing home care costs").

D. The Mechanics of § 1396r-5

Congress balanced these twin goals through a complex and intertwined set of standard requirements and exclusions that a state must apply when allocating income and resources between an institutionalized and a community spouse, both pre- and post-eligibility. *See* 42 U.S.C. § 1396r-5 (2001) (the "statute"). The statute sets forth a series of standard rules for *calculating* spousal income and resources for eligibility purposes, *protecting* certain resources from being depleted to qualify the institutionalized spouse for Medicaid pre-eligibility, *protecting* certain income from being spent on the care of the institutionalized spouse, both pre- and post-eligibility, and *transferring* certain income and resources to the community spouse after eligibility has been established.

1. Income Standards and Transfers

Subsections (b) and (d) of the statute relate to income. The primary concern of these subsections is post-eligibility -- *i.e.*, what portion of a couple's monthly income is required to go towards offsetting the costs of the institutionalized spouse's care once he or she becomes eligible for Medicaid and, conversely, what portion will be left to *protect* the needs of the community spouse. Subsection (b) -- entitled "Rules for treatment of income" -- governs the *calculation* of the respective income of each spouse for purposes of determining what income will be considered available to the institutionalized spouse. Subsection (b)(2) provides that, in "determining the income of an institutionalized spouse or

community spouse for purposes of the post-eligibility income determination described in subsection (d)," income will be considered available to a particular spouse based on the "name-on-the-check" principle. Under this principle, income is considered "available" only to that spouse in whose name payment is made. Income paid in the names of both spouses is evenly divided between them. § 1396r-5(b)(2).

Only subsection (b)(1) applies to pre-eligibility income determinations. It applies both pre- and post-eligibility and provides that "no income of the community spouse shall be deemed available to the institutionalized spouse," subject to certain exceptions. § 1396r-5(b)(1). This departs from prior practice whereby many states regarded the income of either spouse as available to the other for eligibility purposes.

Once eligibility is established, subsection (d) -- entitled "Protection of income for the community spouse" -- then provides for a *transfer* to the community spouse of income deemed available to the institutionalized spouse under subsection (b)(2) (*i.e,* income in the institutionalized spouse's name) where necessary for the *protection* of the community spouse. The stated purpose of this transfer is to ensure that the community spouse has sufficient income to meet his or her basic monthly needs after the institutionalized spouse has spent down to Medicaid eligible levels and must contribute income to offset the costs of his or her care. § 1396r-5(d)(1)(B). Subsection (d) accomplishes this by setting a level defining the community spouse's "minimum monthly maintenance needs allowance" (referred to herein as the "monthly need") as an amount considerably above the poverty level to be established by each state. *Id.* at § 1396r-5(d)(3). It then permits the institutionalized spouse to make an income transfer to the community spouse if the income "otherwise available" to the community spouse is less than this minimum monthly need. § 1396r-5(d)(2). That transferable amount, termed the "community spouse monthly

income allowance" (referred to herein as the "income transfer"), is defined as the amount by which the monthly need exceeds "the amount of monthly income otherwise available to the community spouse." § 1396r-5(d)(2).[2] The state may not consider this transferable income as available to the institutionalized spouse in determining the amount of income that must be used to offset the costs of his care. § 1396r-5(d)(1).

2. Resource Standards and Transfers

Subsections (c) and (f) of the statute relate to resources. In contrast to the post-eligibility focus of the income provisions, the primary focus of the resource provisions is the pre-eligibility depletion of resources necessary to qualify the institutionalized spouse for Medicaid. Subsection (c) -- entitled "Treatment of resources" -- deals with the *calculation* of resources for eligibility purposes. Subsection (c)(1) directs the responsible state agency to make certain resource calculations upon the institutionalization of one spouse. In particular, it directs the agency to calculate both the total value of the couple's combined resources (subject to certain exceptions) and a "spousal share" equal to one-half of that total value. § 1396r-5(c)(1)(A). Subsection (c)(2) then provides that, regardless of state laws relating to community property or the division of marital property, all of a couple's resources are considered available to the institutionalized spouse for eligibility purposes, except for the community spouse resource

---

[2] If the institutionalized spouse refuses to transfer income to the community spouse, the statute contemplates a court order of support that will determine the amount of the income allowance. § 1396r-5(d)(5).

allowance provided for in subsection (f)(2)(A). § 1396r-5(c)(2).

Subsection (f) then addresses the *transfer* and *protection* of resources for the community spouse. Subsection (f)(1) protects against the sheltering of excessive resources in the community spouse's name by providing that an institutionalized spouse may only transfer to the community spouse an amount equal to the "community spouse resource allowance." § 1396(f)(1) (2001). Subsection (f)(2) then defines the community spouse resource allowance as equal to the spousal share, subject to certain statutory maximums and minimums. § 1396r-5(f)(2). Only those resources in excess of the resource allowance are considered available to the institutionalized spouse for eligibility purposes. § 1396r-5(c)(2). Although the resource allowance is *calculated* pre-eligibility so that it can be protected from depletion in qualifying the institutionalized spouse for Medicaid, the actual *transfer* of the resource allowance does not occur until after eligibility. § 1396r-5(f)(1).

3. Adjustments to the Standard Allowances

Subsection (e) of the statute provides for administrative hearings in certain circumstances in which the standard rules described above do not suffice to protect individual community spouses. § 1396r-5(e)(2). For example, the state may set a higher monthly need allowance than the standard amount provided in subsection (d)(2)(A) upon a showing of "exceptional circumstances resulting in significant financial duress." § 1396r-5(e)(2)(B). In addition, the community spouse can receive a higher resource allowance than that provided in subsection (f)(2) upon a showing that the standard resource allowance is "inadequate" in relation to the amount of income that the allowance generates "to raise *the community spouse's income*" to the

monthly need level. § 1396r-5(e)(2)(C) (2001) (emphasis added). In such instances, the statute directs the hearing officer to substitute for the standard resource allowance "an amount adequate to provide" any shortfall. *Id.* It is the meaning of this last provision that is presently before the Court.

E. The Development of the Income-First and Resource-First Rules

The statute does not expressly specify an order of priority for the allocations, transfers, and adjustments when both income and resources are available to protect the community spouse. This has led to some confusion when determining whether to increase the resource allowance under subsection (e)(2)(C). On its face, subsection (e)(2)(C) does not specify whether "community spouse's income" for these purposes encompasses both income attributable to the community spouse under subsection (b)(2)'s name-on-the-check principle and income transferable from the institutionalized spouse under subsection (d)(2), or whether it encompasses only the former.

The majority of states, like Wisconsin, have adopted an "income-first" approach whereby adjustments to the standard resource allowance in order to assure sufficient monthly income to the community spouse may only be made after taking into account any permissible income transfers from the institutionalized spouse. Other states apply a "resource-first" approach, whereby adjustments to the standard resource allowance are permitted whenever the standard resource allowance and income in the community spouse's own name together fail to generate the monthly need amount, without regard to any potential income transfer from the institutionalized spouse.

F. The Drafting History of Subsection (e)(2)(C)

The drafting history of subsection (e)(2)(C) is particularly illustrative of its meaning. Had Congress intended to mandate an automatic resource-first approach, it could have done so much more simply by avoiding the complex resource allocations set forth in subsection (f)(2) in favor of a standard rule defining the resource allowance as that amount needed to generate any shortfall between the monthly need and the income attributable to the community spouse under the name-on-the-check principle espoused in subsection (b)(2). Not only did Congress not do this, but it expressly rejected such a rule in favor of the hearing provisions at issue here.

Under the original House bill, H.R. 2470, 100th Cong. (1987), the only sources available to meet a community spouse's minimum monthly need were: income considered available to the community spouse under the name-on-the check principle, any income generated by the standard resource allowance, and any income transfers from the institutionalized spouse. The House version did not contain an option for increasing the standard resource allowance to meet the monthly need amount if the above three sources were inadequate. *See* H.R. Rep. No. 105(II) (1987), 100th Cong., 1st Sess., § 214, *reprinted in* 1988 U.S.C.C.A.N. 857, 892-95.

Senate bill 1127, although modeled after the House version, added a standard provision that would have automatically reduced those resources deemed available to the institutionalized spouse by the amount necessary to generate the minimum monthly need for the community spouse (after counting her "name-on-the-check" income), without regard to any income of the institutionalized spouse

that might be transferred for that same purpose. *See* 133 Cong. Rec. 29,429-30 (1987).[3] The bill achieved this result by defining the institutionalized spouse's "resources" as excluding those resources needed to produce the monthly need amount for the community spouse.[4] 133 Cong. Rec. 29,429-30 (1987).

Significantly, however, the Conference Committee did not accept either version. Unlike the House bill, it did provide for an adjustment to the resource allowance, if necessary, to increase the community spouse's income to the minimum monthly need level. But, unlike the Senate bill, it did not achieve this result by automatically "exclud[ing] from countable resources those assets necessary to produce income available to the community spouse . . . . " H.R. Conf. Rep. No. 100-661, 100th Cong., 2nd Sess. 264-67 (1988), *reprinted in* 1988 U.S.C.C.A.N. 923, 1042-45. Instead, the Committee authorized the opportunity for a fair hearing embodied in subsection (e)(2)(C). *Id.* at 265, 1988 U.S.C.C.A.N. at 1043.[5] The conferees explained that in such

---

[3] The original Senate MCCA bill, as reported by the Senate Finance Committee, did not contain a spousal impoverishment provision. That section was added by floor amendment sponsored by Senator Mikulski, and co-sponsored by Senators Mitchell and Kennedy. 133 Cong. Rec. 29,350-58 (1987).

[4] It also contained a provision granting a hearing to consider increasing either the monthly need allowance or the community spouse resource allowance, if they were otherwise inadequate to support the community spouse without financial duress.

[5] To effectuate this compromise, the conferees deleted from the Senate version's provision for a fair hearing the requirement of a showing of financial duress in order to increase the resource allowance. The distress showing was retained for requested

(continued...)

a hearing the state must allow the community spouse to retain an "adequate" amount of resources to provide the monthly need "*taking into account any other income attributable to the community spouse.*" *Id.* (emphasis added).[6]

The approach of the conferees is therefore directly at odds with the notion that subsection (e)(2)(C) mandates an

---

increases in the monthly need amount. H.R. Conf. Rep. No. 100-661, 100th Cong., 2nd Sess. 266-67 (1988).

[6] A technical amendment made a few months later confirms Congress' intent that the resource adjustment not be automatic whenever the standard resource allowance fails to generate the monthly need amount. As originally enacted, the provision for an assessment of total resource value on request, contained in subsection (c) (1) (B) of the spousal impoverishment provisions, provided, in pertinent part:

> At the time of providing the copy of the assessment, the State shall include a notice indicating that the spouse has right [sic] to a fair hearing under subsection (e) (2) (E) *with respect to the determination of the community spouse resource allowance, to provide for an allowance* adequate to raise the spouse's income to the minimum monthly maintenance needs allowance.

But in a group of "technical" amendments to the MCCA, the italicized words were deleted. *See* Family Support Act of 1988, Pub. L. No. 100-485, § 608(d)(16)(A)(i), 102 Stat. 2343, 2417. The same amendments also corrected the grammatical error in the words "has right" appearing in bold face above by substituting "will have a right."

automatic resource-first approach. Had Congress intended to mandate a resource-first approach, it easily could have done so by adopting the language in the Senate bill. Instead, however, Congress adopted a compromise position whereby a hearing officer could increase the standard resource allowance, if necessary, "taking into account any other income attributed to the community spouse."

Congress's decision to place the resource allowance in a subsection providing for administrative hearings rather than in provisions defining standard allocations further indicates that it did not intend a mandatory resource-first approach. Rather, this placement demonstrates Congress's expectation that such cases would be exceptions to the standard rules and would require a more complex analysis than the simple formula contemplated in the Senate Bill. *See Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 272 (1996) (drafting history is highly relevant in determining congressional intent regarding "discrete composition and separate placement" of certain subsections).[7]

---

[7] One would assume that Congress would have set the standard resource allowance at a level that would cover most situations without resort to a fair hearing except in exceptional circumstances. Yet, if a mandatory resource-first rule were to apply, the maximum standard resource allowance would almost never be sufficient, except when a community spouse has a high level of income in his or her own name. But it was the very realization that this was often not the case that prompted the enactment of the spousal impoverishment provisions in the first place.

G. Agency Interpretation of Subsection (e)(2)(C)

The federal agency responsible for oversight of the Medicaid Act has also specifically rejected a mandatory resource-first approach.[8] Although it has not published formal regulations interpreting the spousal impoverishment provisions, it and the Secretary of HHS have stated consistently in policy memoranda and in letters that subsection (e)(2)(C) permits consideration of potential income transfers in determining whether the monthly need amount will be met. *Cleary*, 167 F.3d at 805. The agency interpretations in this regard are discussed in detail in the Petitioner's Brief.

II. THE STATUTE DOES NOT MANDATE A RESOURCE-FIRST APPROACH.

A. The Statute Is Ambiguous on This Question.

Every federal circuit court and state court of highest resort to have considered this issue has held that the statute is silent as to whether a hearing officer can consider potential income transfers in conducting the subsection (e)(2)(C) analysis. Taking the language of the statute, its drafting history and agency interpretations together, these courts have uniformly held that the income-first approach is a permissible one. *See id.* at 811; *Chambers*, 682 N.E.2d at 879; *Golf*, 697 N.E.2d at 558.

---

[8] At the time of the agency guidance discussed herein, the agency within HHS responsible for oversight of the Medicaid program was the Health Care Financing Administration ("HCFA"). That agency is now called the Center for Medicare and Medicaid Services ("CMS").

Because the mandatory resource-first approach allows institutionalized spouses to qualify for Medicaid much more rapidly and allows community spouses to protect a larger -- in most cases, substantially larger -- share of a couple's resources, the permissibility of the income-first approach has been disputed intensely by advocates for the elderly. They contend that the words "the community spouse's income" in subsection (e)(2)(C) on their face refer only to income attributed to the community spouse under subsection (b)(2)'s "name-on-the-check" rule. As such, they argue that consideration of the drafting history and agency interpretations discussed above is impermissible. In the case presently on review, the Wisconsin Court of Appeals agreed with this view. As discussed below, this interpretation reflects a fundamental misunderstanding of the role of subsection (e)(2(C) in the statutory scheme.

B. The Statute Does Not Specify What Sources of Income May Be Considered in the (e)(2)(C) Analysis.

As an initial matter, the application of a "plain meaning" analysis to the Medicaid Act - - long recognized as one of the most impenetrable statutes ever conceived -- is close to oxymoronic. As this Court has recognized, the Act's "Byzantine construction" makes it "'almost unintelligible to the uninitiated.'" *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981) (quoting *Friedman v. Berger*, 547 F.2d 724, 727 n. 7 (2ndCir. 1976)). This is especially true of the spousal impoverishment provisions, which contain many interrelated provisions that make it difficult -- if not impossible -- to attach a plain meaning to any one sentence in isolation. Indeed, the differing views of the various courts and state agencies as to the meaning of subsection (e)(2)(C) strongly suggest that its meaning is far from plain. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996)

(stating that varying court interpretations suggest that the meaning of a word in a statute is ambiguous).

Even putting this aside, however, the language of the statute does not support a mandatory resource-first approach. As discussed above, the statute specifically contemplates numerous sources of income for the community spouse to meet his or her monthly need, including income transferable from the institutionalized spouse. Subsection (e)(2)(C), however, does not define "community spouse's income" as used therein, nor does it specify which sources of income to look to in determining whether the "community spouse's income" is adequate to meet the monthly need, nor does it cross-reference any other subsection of the statute from which to derive such a definition.

C. The Fact That Income Transfers Occur Post-Eligibility in No Way Precludes the Hearing Officer from Considering Such Future Transfers in the (e)(2)(C) Analysis.

Opponents of the income-first rule argue that the term "community spouse's income," as used in subsection (e)(2)(C), on its face excludes income transfers from the community spouse. The basis for their argument in this regard is that subsection (e)(2)(C) involves establishment of the resource allowance, which is a pre-eligibility determination, whereas income transfers occur post-eligibility. Because income transfers are not made until after eligibility is established, the argument goes, such transfers cannot be considered in the pre-eligibility calculation of the resource allowance. As evidence of this, proponents of a mandatory resource-first rule point to the fact that subsection (f) -- which governs transfer of resources -- provides for a pre-eligibility calculation of the resource allowance, whereas subsection (d) -- which governs transfers of income -- does not.

This argument ignores other provisions of the statute and fails to appreciate the role of subsection (e)(2)(C) in the overall statutory scheme. *See Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (in ascertaining plain meaning, a court must consider the language and design of the statute as a whole). The fact that income transfers do not occur until post-eligibility does not mean that the hearing officer may not *consider* such future transfers in determining whether it is necessary to raise the standard resource allowance in order to protect the community spouse adequately. After all, the hearing officer's very function in the (e)(2)(C) analysis is to make a forward-looking determination as to the financial situation of the community spouse *once the institutionalized spouse qualifies for Medicaid*. Indeed, while the hearing officer can set a higher resource allowance, the statute specifically provides that the resource allowance itself may not be *transferred* to the community spouse until *after* eligibility is established.

The resource allowance is nothing more than a pre-eligibility calculation, done in advance to ensure that resources are not overly depleted in qualifying the institutionalized spouse for Medicaid.[9] The community spouse's entitlement to a minimum monthly needs allowance -- the adequacy of which is subsection (e)(2)(C)'s focus -- also does not arise until after eligibility. Properly

[9] There is a common-sense explanation for why the income allowance, unlike the resource allowance, need not be calculated pre-eligibility. Whereas resources are a finite, depletable sum, sources of income typically recur monthly, or bi-monthly, whatever the case may be. There is therefore not the same concern that income would be completely depleted in qualifying the institutionalized spouse for Medicaid were a certain amount not protected in advance.

understood, the role of the hearing officer is to determine whether all of the sources from which that minimum monthly need is derived will be adequate when the time comes.

Put another way, subsection (e)(2)(C) allows the hearing officer to make a "snapshot" of the future to see if the standard allowances and allocations will be adequate to meet the community spouse's monthly need. This "snapshot" of the future by nature must be taken prior to eligibility while there are still additional resources available to cover any shortfall. Nothing in the statute, however, precludes the hearing officer in taking this "snapshot" from considering *all* post-eligibility sources of income contemplated by the statute -- *i.e.*, income automatically protected for the community spouse under the name-on-the-check principle (including income generated from the resource allowance) and income transfers. No purpose is served by recognizing only one of the two sources of income protected for the community spouse and ignoring the other. No matter what the outcome, the actual transfer of either income or resources would not be made -- and would not need to be made -- until after eligibility is established.

D. The Mandatory Resource-First Rule Renders the Standard Income Allowance Meaningless.

The mandatory resource-first approach also gives unduly short shrift to subsection (d) of the statute. Under the mandatory resource-first approach, an income transfer under subsection (d) would be necessary only in cases where at the time the spouse enters the institution (or first applies for Medicaid) the couple does not have enough resources to generate income to cover the shortfall between the monthly need and the income otherwise considered available to the community spouse. Yet, the text of subsection (d) demonstrates that the income transfer -- termed the "community spouse income allowance" -- was intended to

play an integral role in providing the community spouse's monthly need.

Most tellingly, the concept of the minimum monthly need is first introduced in the same subsection permitting the income transfer. The income transfer is itself *defined* as "the amount by which the minimum monthly needs allowance . . . exceeds . . . the amount of monthly income otherwise available to the community spouse (determined without regard to such an allowance)." 42 U.S.C. § 1396r-5(d)(2)(A)(B).[10] Even subsection (d)'s title -- "Protection of income for the community spouse" -- indicates that it is the primary vehicle for ensuring that a community spouse has enough income on which to live after the institutionalized spouse qualifies for Medicaid. Given this, it defies common sense to say that the detailed standard rules set out in subsection (d) -- an integral part of which is the very definition of the minimum monthly need -- would take a secondary role to a provision buried in the section of the statute devoted to individual adjustments to the standard allowances.

E. The "Name-on-the-Check" Rules Regarding the Availability of Income in Subsection (b)(2) Do Not Preclude Consideration of Income Transfers As Part of the (e)(2)(C) Analysis.

While proponents of the mandatory resource-first approach underplay the role of subsection (d), they overplay the role of subsection (b)(2). They contend that the term

---

[10] The inclusion of the parenthetical in the above subsection further illustrates that Congress considered the income transfer to constitute income available to the community spouse for purposes of subsection (e)(2)(C).

"community spouse's income" in subsection (e)(2)(C) necessarily refers to income defined as attributable to the community spouse in subsection (b)(2) (the "name-on-the-check" principle). But subsection (b)(2) does not by its terms apply to allocation of resources, which is the focus of subsection (e)(2)(C). *Id.* Rather, subsection (b)(2) expressly states that the principles set forth therein apply only "in determining the income of an institutionalized spouse or a community spouse for purposes of the post-eligibility income determination described in subsection (d)." *Id.* at § 1396r-5(b)(2).

In other words, the rules which determine what income is considered available to the community spouse and the institutionalized spouse, respectively, under subsection (b)(2) are used solely to define that amount of income *automatically* protected for the community spouse in every instance (*i.e.*, income that is *per se* unavailable to offset the cost of the institutionalized spouse's care). Subsection (d)(1) then identifies an *additional* category of income that may be transferred to the community spouse for her protection, if needed, to meet any shortfall in the community spouse's minimum monthly need. As the Third Circuit correctly recognized in *Cleary*, this provision demonstrates that subsection (b)(2) does "not prevent allocation . . . of the institutionalized spouse's income for the needs of the community spouse." *Cleary*, 167 F.3d at 809.

F. The Permissibility of Either Approach Is Consistent With the Placement of (e)(2)(C) in the Fair Hearing Section of the Statute.

A mandatory resource-first rule also ignores the placement of subsection (e)(2)(C) within the fair hearing provisions of the statute and the import of the fair hearing process in the statutory scheme. *Id.* Subsection (e)(2)(A) permits a hearing if the spouses are dissatisfied with the calculation of any one of the five components that create the

income on which the community spouse must live post-eligibility: the income transfer, the income "otherwise" available to the community spouse under the name-on-the-check principle, the computation of the spousal share, the attribution of resources, and the resource allowance. *Id.* "The fact that the 'fair hearing' subsection . . . starts . . . with a recitation of the []components that make up the community spouse's income . . . indicate[s] that a revision of one of those components . . . should be made only with a consideration of the other four." *Id.* at 810.

Placement in a hearing context also suggests that circumstances involving this problem should be the exception to the rule. Under a mandatory resource-first approach, however, any community spouse without a large amount of income in his or her own name would have to seek a fair hearing in which the hearing officer's only role would be to apply a straightforward formula. One would expect, however that the more likely purpose for a hearing officer's involvement would be to find facts and exercise some discretionary judgment.[11]

G. The Income-First Rule Furthers the Twin Purposes Underlying the Statute.

Finally, the income first rule furthers the twin policies of the spousal impoverishment provisions "to prevent impoverishment of the community spouse," "but not to permit the sheltering of personal wealth at public expense."

---

[11] For example, there may be atypical cases in which the institutionalized spouse's sources of income do not occur monthly or bi-monthly but rather are sufficiently uncertain and cannot reasonably be relied upon to provide for the community spouse's needs during the period of the institutionalized spouse's stay in the nursing home.

Golf v. New York Department of Social Services, 697 N.E.2d 555, 563 (N.Y. 1998). The spousal impoverishment provisions reflect a legislative balance of competing concerns. As such, they were "not intended to offer a financial boon for applicants or to provide a route upon which one could bypass the obligation to contribute one's fair share of the costs associated with nursing home care." *Id.* at 560. The income-first approach serves the goal of allowing the community spouse to "live comfortably" while also "protecting against the depletion of limited Medicaid resources by individuals capable of helping themselves." *Id.*

The chart below provides a useful illustration of the difference in a community spouse's financial situation under the prior law, under the income-first approach, and under the resource-first approach. It is based on facts present in the *Chambers* case in the Sixth Circuit. *See* 145 F.3d at 800, n.12.

ILLUSTRATION OF A SAMPLE COUPLE'S FINANCIAL SITUATION.	Pre-1990	Post -1990	
		Income First	Resource First
Initial Resource Allocation:			
Total Resources	$169,655	$169,655	$169,655
CS' Resource Allocation	n/a	$72,660	$72,660
IS' Resource Allocation	$169,655	$96,995	$96,995
Determining CS' Monthly Income Deficiency:			
Monthly Needs Allowance	n/a	$1,230	$1,230
Less CS' Monthly Income	$417	($417)	($417)
Less Monthly Income Off CSRA at 6% Interest	n/a	($363)	($363)
Equals CS' Monthly Income Deficiency	n/a	$450	$450
Satisfying The Monthly Income Deficiency:			
Monthly Income Transfers (From IS' $857 Soc. Sec.)	$165	$450	$0
CSRA Enhancement	n/a	$0	$90,000
End Result:			
Total Protected Resources	$0	$72,660	$162,660
Resources Required to be Expended Prior to Eligibility	$169,665	$96,995	$6,995
Total CS Income Post-Eligibility	$582	$1,230	$1,230

As the above chart illustrates, application of a mandatory resource-first rule, especially in circumstances involving a community spouse with little or no income on which to live, would permit the routine transfer of hundreds of thousands of dollars over and above the standard resource allowance and would enable institutionalized spouses to qualify for Medicaid very soon after institutionalization, if not immediately. *Id.* While such a result might be thought desirable in an ideal world -- and some states do apply it -- states should not be forced to adopt this approach without unambiguous direction from Congress or the state legislature. *Id.*[12] The spousal impoverishment provisions do not provide that unambiguous direction. Any change that might require States to open their Medicaid programs to those in the middle-class is a decision that properly should be made in a legislative, not a judicial, forum.

---

[12] Opponents of the income-first rule argue that in certain situations a community spouse may not have a guaranteed source of income to meet the monthly need if the institutionalized spouse predeceases the community spouse. As an initial matter, the most common sources of income typically transfer over to the surviving spouse. Moreover, even if income available to a community spouse does decrease somewhat upon the institutionalized spouse's death, the community spouse is not left destitute. Rather, the community spouse still has access to the standard amount of resources, any income in his or her own name, and any survivor income and benefits of the institutionalized spouse. This is far more than he or she would have been left with under prior law. The imposition of a mandatory resource-first rule would vastly overcompensate for the perceived problem.

CONCLUSION

For the foregoing reasons, the amici states respectfully urge the Court to reject a mandatory resource-first interpretation of 42 U.S.C. § 1396r-5(e)(2)(C), and to hold that the income-first approach applied by the many states is a permissible interpretation of the statute.

Respectfully submitted,

Of Counsel:
Bill Pryor
Alabama Attorney General;

Carla J. Stovall
Kansas Attorney General

John J. Farmer
New Jersey Attorney General

Wayne K. Stenehjem
North Dakota Attorney General

Betty D. Montgomery
Ohio Attorney General

Paul G. Summers
Tennessee Attorney General

Mark L. Shurtleff
Utah Attorney General

Christine O. Gregoire
Washington Attorney General

Dated: September 7, 2001

***Amici Curiae* Medicaid Agencies:**
Alabama Medicaid Agency, Alaska Department of Health and Human Services, Idaho Department of Health And Welfare, Kansas Department of Social and Rehabilitation Services, Kentucky Cabinet for Medicaid Services, Louisiana Department of Health and Hospitals, New Jersey Department of Human Services, North Dakota Department of Human Services, Ohio Department of Human Services, The Oklahoma Health Care Authority, Rhode Island Department of Human Services, Tennessee Department of Human Services, Utah Department of Health, Washington Department of Social and Health Services